# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT.

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**ISAAC S. MORELAND,**
**Appellant.**

**vs.**

**J. SAM BROWN, as Receiver of the First National Bank of Helena,**
**Appellee.**

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APPELLANT'S BRIEF.

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RICHARD R. PURCELL and THOMAS J. WALSH,
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This case comes to this court on appeal from the decree of the Circuit Court of the Ninth Judicial Circuit in and for the District of Montana, entered upon the order of that court sustaining the appellee's general demurrer to the appellant's amended bill of complaint.

The First National Bank of Helena, a national banking institution, closed its doors and suspended business hopelessly and irretrievably insolvent on September 3, 1896. On August 31, 1896,

the appellant had due him from one Anderson, then in New York City, $2,635. By agreement between appellant and Anderson, the latter on that day deposited the amount named, in payment of his obligation to appellant, in the First National Bank of New York, to be by it transmitted to appellant. The New York bank immediately placed this amount to the credit of the First National Bank of Helena and telegraphed the latter to pay a like sum to appellant. Appellant being advised of this direction, called on the First National Bank of Helena and demanded payment, but that bank refused to give him anything in payment except exchange drawn by it on the First National Bank of New York. This appellant refused to take. The Helena bank then requested that he allow it to place the amount to the credit of his account with it. This he likewise refused. After protracted negotiation, appellant at all times demanding payment to him in cash, and the bank finally peremptorily refusing to give him anything except exchange on New York, he took a draft drawn by the First National Bank of Helena on the First National Bank of New York, with the express reservation declared to the bank at the time, however, that he should consider it as payment of the amount due him only in case it was duly honored.

At this time the bank was insolvent as before recited, and it was known by its officers to be so. The draft was immediately forwarded for payment, but payment was refused because the drawer had suspended.

At the time of the suspension of the Helena bank, it had to its credit on the books of the New York bank, including the credit placed there on account of the money of appellant applied by the

latter bank to the credit of the account of the Helena bank, about $11,000. It was at the same time obligated to the New York bank to the amount of about $15,000, and to secure this indebtedness the New York bank held collateral notes and other securities pledged with it by the Helena bank, the face value of which was about $100,000.

After a receiver of the suspended bank had been appointed, under the advice and permission of the Comptroller of the Currency, he redeemed these collaterals by paying the New York bank the difference between the amount with which the Helena bank stood credited on its books (including the credit on account of appellant's money), and the amount to which it was obligated and for which the collaterals were peldged, and thus procured the securities to be released and turned over to him, the receiver, the New York bank supposing that the Helena bank had paid appellant pursuant to its telegram. Out of these collaterals the receiver obtaining them, and the appellee, his successor, substituted as defendant, has realized more than the amount paid to redeem them.

The appellee, under these circumstances, asks that he be decreed to have a lien upon the collaterals so redeemed to the amount of $2,635 and interest, and that the appellee be required to pay into court that amount to his use.

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That he is entitled to this relief seems perfectly clear, either under the doctrine of the right to follow trust funds or the doctrine of equitable assignment or subrogation.

That the relation of debtor and creditor never existed between

appellant and either of the banks as to these funds must be conceded. The title to them at all times remained in the appellant.

Montagu vs. Pacific Bank, 81 Fed. 602.

First National vs. Armstrong, 36 Fed. 59.

They were used by the two banks, or rather by the New York bank and the receiver, in paying off a secured indebtednes due from the Helena bank to the New York bank. Practically the money was used in the purchase by the receiver of the equity of redemption which the Helena bank had in the collaterals.

The rule that when the money for a purchase is furnished by one and the title taken in the name of another a trust arises in the property purchased in favor of the former is, of course, well established.

Perry on Trusts, 126.

Pomeroy's Equity Jurisprudence, 1037.

If the transaction is carried on with the knowledge and assent of the owner of the funds the trust is "resulting"; if the funds are applied by a person holding them in a fiduciary capacity in violation of the trust under which he holds them, it is called "constructive."

Perry on Trusts, 127.

Pomeroy's Eq. Juris., 1037, note, 1051.

So if a thief steals my money and converts it into some other form of property a trust arises in such property in my favor.

Newton vs. Porter, 69 N. Y. 133.

Bank vs. Barry, 125 Mass. 20.

Or if my servant embezzles it.

Wells vs. Robinson, 13 Cal. 133.

Whenever one puts the money of another into property the trust arises.

Nebraska Bank vs. Johnson, 71 N. W. 294.
Beck vs. Uhrich, 13 Pa. St. 636.

The rule is not confined to real estate, but embraces personal property as well, bonds, annuities, stocks, mortgages or other personal interests.

Perry on Trusts, 130.

It is but an application of this principle to hold that when a thief steals money or an agent embezzles it and uses it in paying off a mortgage on his house, the mortgage is kept ailve in equity and is held to be assigned to the person whose funds were used in paying it off.

In Greiner vs. Greiner, 58 Cal. 115,
the defendant had used funds of his wife, the plaintiff, in paying off an indebtedness at a bank to secure which it held certain notes secured by mortgages which he had pledged as collateral. He then transferred them to other defendants, not bona fide purchasers, and the court held that she had a lien upon the securities to the amount to which her money had been applied to redeem them at the bank.

It is absolutely impossible to distinguish in any way this case from the one at bar. It is rare that a precedent so fully meets the case presented.

The case of

Oury vs. Saunders, 13 S. W. 1030,

is equally conclusive upon the equity of the bill. In that case a

guardian purchased a piece of real estate which became his homestead and gave his notes for it. Under the law of Texas the vendor had a lien upon the property for the unpaid purchase money. The purchaser afterwards used the money of certain wards whose guardian he was, in paying off his notes. It was held that the wards were subrogated to the rights of the vendor and could enforce his lien against the property.

This right of subrogation has been most liberally applied by the courts in more recent years whenever necessary to promote justice.

A leading author says it is broad enough to include every instance in which one not a mere volunteer pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter.

Sheldon on Subrogation, 1.

Subrogation takes place when a debt due from one is paid out of a fund belonging to another.

24 Am. & Eng. Ency., 189, note.

And in case the money of one is used to discharge claims against a trust estate he is substituted to the rights of the holders of such claims before their payment in order to effect justice.

Hines vs. Potts, 56 Miss. 346-350.

So a purchaser at a void trustee's sale is subrogated to the rights of the creditors if his money has gone to pay off their claims.

Harris on Subrogation, 37.

And so a purchaser at a void administrator's or guardian's sale, or a void execution sale.

Harris on Subrogation, 51 et seq.

In

Wehrle vs. Wehrle, 39 Oh. St., 365-368,

the right of subrogation in these cases is expressly put upon the ground that the money of the party asking relief has been applied to the payment of the debts of the estate.

Subrogation is also allowed in equity in order to accomplish a result always desirable in any court and particularly sought after in equity, the avoidance of multiplicity of suits or circuity of action.

Fellows vs. Fellows, Cow. 682-699.
Hampton vs. Phipps, 108 U. S. 260.
Smith vs. Wyckoff, 11 Paige 49.

With this end in view equity permits a creditor to proceed directly to enforce collaterals held by a surety for his indemnity.

Colebrook on Collateral Securities, 217,

instead of compelling the creditor to proceed against the surety and then requiring the latter to resort to his collaterals.

We may, appellee will admit, go to New York and recover our money of the bank there. It having let the collaterals go under the belief that the Helena bank had paid appellant, may then come to Montana and re-establish its lien upon these collaterals upon plain equitable grounds and have them subjected for its reimbursement. It would be a reproach to the adminisrtation of equity, if each of these two sufferers were compelled to wander across the continent, each seeking a foreign jurisdiction, and vex the courts

with two suits, when the whole controversy can be disposed of in this one action—prosecuted in the jurisdiction within which both of the parties reside.

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The same result is reached if we follow this money as a trust fund. All that is necessary is, according to the rule established by this court, that the claimant must be able to show that his property either in its original or in a substituted form is in the hands of the defendant.

Spokane Co. vs. First N. B., 68 Fed. 979-982.

Or, as it is expressed in the opinion of the court in the same case, "if the estate has been thereby increased or better prepared to meet the demands of creditors," reimbursement is proper.

If the New York bank had turned the money over to the Receiver there is no doubt that we could recover it of him.

Com. Nat. vs. Armstrong, 148 U. S. 50.

Nurse vs. Satterlee, 46 N. W. 1102.

If it had given the Helena bank a certificate of deposit and this *chose* had come into the hands of the receiver we could have compelled him to surrender it to us. If he had turned in this certificate and $4,000 in cash and thus redeemed the collateral, what doubt would there be about the appellant's right to a lien upon them? If instead of a certificate of deposit a mere receipt for the money, or some other non-negotiable paper, had been given the Helena bank, and this had been turned in by the Receiver to release the collateral, the situation would not be changed.

The credit on the books of the New York bank produced by the

payment to it of appellant's money was availed of by the receiver in exactly the same manner as would have been the cash, the certificate of deposit, the receipt or the I. O. U. of the New York bank in the cases supposed.

By the transaction between these banks, the New York bank became indebted to the Helena bank in the sum of $2,635. If, in following the property in its transmutations, a debt from one to another is reached, such a debt is "substituted property."

Morse on Banks, 565, note.

The credit served all the purposes of so much cash in the hands of the receiver to effect the redemption. The amount of money necessary to be paid by him to redeem was reduced just so much.

"The estate has been thereby increased or better prepared to meet the demands of creditors."

Spokane Co. vs. F. N. Bank, supra.

The case of

Thuemmler vs. Barth, 62 N. W. 94,

approaches very closely to a determination of the exact question involved in this case. In that proceeding the failing bank had received a note for collection. It sent the note to a correspondent bank to which it was indebted with instructions to collect and credit to the account of the sending bank, which was done. The collecting bank held a large amount of collateral pledged with it by the failing bank. The owner of the note brought suit against the receiver of the failed bank, claiming that the collateral (assets of the failed bank) had been relieved from the charge against them to the amount of the note and the estate benefitted to that extent. His prayer was denied because it did not appear that the receiver

had exercised his option to redeem the collateral. It is fairly inferable from the opinion that had he done so the plaintiff would have established a trust in the securities.

On no just or equitable grounds can the general creditors of this bank claim the benefit of the appellant's money for the redemption of these collaterals. The bill avers that they have collected out of them all that they were required to pay to get them. They have no right to them except upon the payment of what was really owing to the New York bank by the Helena bank. They were legitimately subject to a charge in the hands of the New York bank to the amount of $6,635, and the general creditors have no just cause of complaint if they are not premitted to profit out of them until that amount is made. It would not be good morals or good law to allow them to retain the advantage they have gained at the expense of the appellant, by reason of the error of the New York bank in supposing that his claim was paid.

By an affirmance of the judgment herein, "the appellant will be deprived of his own, and the general creditors will receive that to which they have no right."

Standard Oil Co. vs. Hawkins, 74 Fed. 395-402.

The court will require the receiver to act under the circumstances not as the law would permit an ordinary litigant, but, being the trustee of the court, as would a high-minded man.

Id.

Respectfully submitted,

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Solicitors for Appellant.